

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 18 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

V.

ROBERTO FLORES-PIMIENTA,

Defendant - Appellant.

No. 05-50664

D.C. No. CR-05-00652-MJL

MEMORANDUM^{*}

Appeal from the United States District Court
for the Southern District of California
M. James Lorenz, District Judge, Presiding

Submitted June 7, 2006^{**}
Pasadena, California

Before: D.W. NELSON, RAWLINSON, and BEA, Circuit Judges.

Roberto Flores-Pimienta appeals his conviction and sentence for illegal re-entry after deportation under 8 U.S.C. § 1326. We have jurisdiction pursuant to 28

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

U.S.C. § 1291, and we affirm his conviction, vacate his sentence and remand for resentencing.

A removal effectuated either by an order of removal or by the reinstatement of an order of removal constitutes a removal under 8 U.S.C. § 1326. *Cf. United States v. Luna-Madellaga*, 315 F.3d 1224, 1226 (9th Cir. 2003) (discussing 8 U.S.C. § 1326(b)); *United States v. Carrillo-Lopez*, 313 F.3d 1185, 1187 (9th Cir. 2002) (same). Therefore, the factual basis for Flores-Pimienta's plea was adequate, and we must uphold his conviction.

To determine the existence of a prior conviction, the district court may rely on “any information . . . so long as it has sufficient indicia of reliability to support its probable accuracy.” *See United States v. Marin-Cuevas*, 147 F.3d 889, 894-95 (9th Cir. 1998) (internal alterations omitted) (emphasis added). In the present circumstances, both the unchallenged presentence report and the judgments of conviction were sufficiently reliable. *Id.* at 895 (holding that a presentence report that is challenged only as insufficient proof constituted sufficient evidence); *United States v. Carroll*, 932 F.2d 823, 825 (9th Cir. 1991) (“In the absence of other evidence, the court records . . . must be presumed to be correct.”). Therefore, the

district court properly calculated Flores-Pimienta's criminal history category.¹

Nevertheless, we are compelled to conclude that the district court imposed a sentence that was unreasonable under *United States v. Booker*, 543 U.S. 220 (2005). Our recent precedent makes clear that the consideration of the sentencing factors set forth in 18 U.S.C. § 3553 is mandatory. *United States v. Diaz-Argueta*, 447 F.3d 1167, 1171 (9th Cir. 2006) (citing *Booker*, 543 U.S. at 261). “This requirement does not necessitate a specific articulation of each factor separately, but rather a showing that the district court considered the statutorily-designated factors in imposing a sentence.” *United States v. Knows His Gun*, 438 F.3d 913, 918 (9th Cir. 2006); *see also United States v. Mix*, 442 F.3d 1191, 1196-97 (9th Cir. 2006). Here, there was no such showing. Apart from the Sentencing Guidelines, the district court was absolutely silent as to the factors listed in § 3553(a). Even careful consideration of the presentence report and the arguments presented by the government and the defendant will not cure such an error.

Diaz-Argueta, 447 F.3d at 1171-72.

¹ We note that the limits imposed by *Shepard v. United States*, 125 S. Ct. 1254, 1263 (2005), are inapplicable in the instant case. *Shepard* merely limits the range of documents upon which the court may rely in determining whether a prior conviction is a predicate offense under the modified categorical approach of *Taylor v. United States*, 495 U.S. 575 (1990), which is not at issue here. *Shepard*, 125 S. Ct. at 1257, 1259-60.

Accordingly, Flores's conviction is **AFFIRMED**. The sentence is **VACATED**, and the case is **REMANDED** for resentencing.